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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALFRED ARTHUR SANDOVAL, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*,

---- AND ----

CLARENCE VICTOR, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF NEBRASKA, *Respondent*.

On Writs of Certiorari to the Supreme Courts of the States of California and Nebraska

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MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Did *Cage* v. *Louisiana*, 498 U. S. 39 (1990) extend the Due Process Clause so much that the California and Nebraska reasonable doubt instructions are unconstitutional?

IN THE

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of respondents in the above-captioned cases. Counsel for petitioner Sandoval has refused consent; counsel for all other parties have consented.

In the accompanying brief, *amicus curiae* argues that the California and Nebraska reasonable doubt instructions do not violate due process.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present cases present the question of the continued validity of reasonable doubt instructions used in California and Nebraska. Overturning these instructions would require an unnecessary expansion of the Due Process Clause and would severely disrupt the criminal justice systems of several states. This needless disruption is contrary to the interests CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests leave to file its brief.

December, 1993

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

SUMMARY OF FACTS AND CASE

Petitioner Sandoval in No. 92-9049 was convicted on four counts of first degree murder with a multiple-murder special circumstance finding. See *People* v. *Sandoval*, 4 Cal. 4th 155, 167-168, 841 P. 2d 862, 866 (1992). The jury returned a verdict of death for one killing and verdicts of life without possibility of parole for the three other murders. *Id.*, at 168, 841 P. 2d, at 866. The jury was given an instruction substantially similar to the standard jury instruction on reasonable doubt, CALJIC 2.90.[1] See

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1. See Appendix for the text of CALJIC 2.90.

Opp., at 5, n. 2. The California Supreme Court affirmed Sandoval's convictions and sentence. See *id.*, at 198, 841 P. 2d, at 886.

Petitioner Victor in No. 92-8894 was convicted of first degree murder and use of a weapon to commit a felony for killing 82-year-old Alice Singleton. He was sentenced to death for the murder. *State* v. *Victor*, 494 N. W. 2d 565, 568 (Neb. 1993). His jury was given essentially the same reasonable doubt instruction that was approved by the Nebraska Supreme Court in *State* v. *Morley*, 474 N. W. 2d 660 (Neb. 1991).[2] *Victor*, *supra*, 494 N. W. 2d, at 569. Relying on *Morley*, the Nebraska Supreme Court rejected Victor's challenge to the reasonable doubt instruction. *Ibid*.

SUMMARY OF ARGUMENT

Because due process arguments have great potential for needless interference in state criminal procedure, this Court has been very reluctant to expand the guarantee. Instead, this Court has traditionally deferred to the state's primacy in criminal law.

This deference was reaffirmed in *Medina* v. *California*, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992). *Medina* established that a procedure that is not contrary to established practice will not violate due process unless it is fundamentally unfair. As few practices are so egregious as to be fundamentally unfair, the vast majority will not violate the Due Process Clause.

The California and Nebraska reasonable doubt instructions are sanctioned by history and are not fundamentally unfair. The California instruction is taken from the landmark case in the modern definition of reasonable doubt. This definition of reasonable doubt has been

2. See Appendix for the text of the *Morley* instruction.

consistently popular with the states and has been approved by this Court. The Nebraska instruction is composed of similarly acceptable parts. Voiding these traditional instructions would be a particularly excessive expansion of due process.

Recent treatment of the instructions supports their constitutionality. They are still popular in several states, and the criticism of them has been primarily of a practical, not constitutional, nature.

Nor are these instructions fundamentally unfair. These long-respected procedures are not the egregious practices that fundamental fairness protects against. They are the good faith efforts of two states to define reasonable doubt. Due process requires no more.

Cage v. *Louisiana*, 498 U. S. 39 (1990) *(per curiam)* does not change the analysis. Neither instruction contains any reference to "grave uncertainty," the phrase that was key to the *Cage* decision. While the California and Nebraska instructions do contain language that was criticized in *Cage*, this language was used in a different context than what was condemned in *Cage*. Finally, the standard of review for jury instructions employed by *Cage* has been subsequently rejected by this Court.

This Court should be particularly hesitant to interfere with a state's definition of reasonable doubt. If this Court strikes down the two instructions before it, then there will be a great demand for this Court to supply an approved definition of reasonable doubt. Unfortunately, no clearly superior alternative standard exists. This Court should therefore avoid announcing a standard, because it would stifle innovation and prevent the states from developing the best standard. Finally, undue interference with state reasonable doubt instructions is too close to constitutionalizing the law of evidence, a development this Court must avoid.

ARGUMENT

I. State criminal procedures that conform with traditional practices are due great deference under the Due Process Clause.

A. Tradition of Deference.

"Due process" is a potentially loaded term. Because it does not state what specific processes are due, it could be misinterpreted to burden the states with virtually any procedure. Such pervasive federal control of criminal procedure violates a basic principle of federalism, that preventing and dealing with crime is primarily a state matter. See *Patterson* v. *New York*, 432 U. S. 197, 201 (1977).

Thus, "the Due Process Clause has never been perverted so as to force upon the . . . States a uniform code of criminal procedure." *Carter* v. *Illinois*, 329 U. S. 173, 175 (1946). Instead, "[u]nder our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for commission of these crimes, and establishing procedures for criminal trials rests with the States." *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 734, 111 S. Ct. 2597, 2607 (1991).

This still leaves the problem of how to protect state criminal procedure from unduly expansive interpretations of the Due Process Clause. One way to limit the reach of due process would be to judge state procedures against the common law. The advantage of using the common law is that what process was due is relatively well known, thus limiting the reach of the clause. Unfortunately, this is too restrictive on the states. Preventing the states from departing from the common law would stifle criminal procedure, preventing much of the experimentation that is so vital to federalism. Thus *Hurtado* v. *California*, 110 U. S. 516 (1884) allowed California to use a preliminary hearing instead of the common law indictment because states must be given the freedom to develop their own

procedures. The Due Process Clause of the Fourteenth Amendment

> "refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and *the greatest security for which resides in the right of the people to make their own laws*, and alter them at their pleasure." *Id.*, at 535 (emphasis added).

At the heart of this argument is the idea that this Court cannot impose a particular procedure upon the states simply because it believes that its procedure is better. A state procedure "does not run foul of the Fourteenth Amendment because another method may seem to [this Court's] thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934). Instead, a state "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as *fundamental*." *Ibid.* (emphasis added).

The incorporation doctrine has narrowed the scope of *Snyder*. Its statements about self-incrimination and jury trial, see *ibid.*, are no longer true. See *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964); *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968). But incorporation, if anything, strengthens the case for limiting the scope of procedural due process. The incorporation of most of the Bill of Rights gives state defendants many specific protections. As the Bill of Rights has become more and more like a national code of criminal procedure, see Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 155-156 (1970), there is even less need for expansive interpretations of the Due Process Clause. See

Dowling v. *United Sta'es*, 493 U. S. 342, 352 (1990). A corollary to this development is that modern claims under due process are less likely to invoke specific rights, but instead rely on much more ephemeral claims of general unfairness. Thus this Court today has even less reason for expanding due process.

Justice Harlan affirmed this development in his opinion for this Court in *Spencer* v. *Texas*, 385 U. S. 554 (1967). "In the procedures before us, in contrast, no specific federal right . . . is involved; reliance is placed solely on a general 'fairness' approach. In this area the Court has always moved with caution before striking down state procedures." *Id.*, at 565. Instead of adopting its own code of fairness, this Court has instead deferred to state judgments, choosing to limit its discretion under the Due Process Clause. See *Leland* v. *Oregon*, 343 U. S. 790, 799 (1952).

B. Medina v. California.

The tradition of deference to state criminal procedure was reaffirmed in *Medina* v. *California*, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992). The *Medina* Court rejected the balancing test that had been developed for administrative law in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976) and adopted the traditional deference to state criminal procedure enunciated in *Patterson* v. *New York*, 432 U. S. 197 (1977). *Medina*, *supra*, 120 L. Ed. 2d, at 361, 112 S. Ct., at 2576-2577.

The *Patterson* Court had rejected a due process challenge to New York's placement of the burden of proof of the affirmative defense of extreme emotional disturbance on defendant. This decision was bottomed on the tradition of deference to state courts in criminal matters. See *Patterson*, *supra*, 424 U. S., at 201. Given its decision not to interfere with the state procedure "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked

as fundamental,' " *id.*, at 202 (quoting *Speiser* v. *Randall*, 357 U. S. 513, 523 (1958)), the *Patterson* Court had to find some substitute for a simple balancing of interests. Deference to historically accepted procedures achieved the twin goals of placing a limit on any open-ended guarantees of fairness while at the same time preserving those rights that are worthy of being called fundamental.

Thus, it was important to the *Patterson* Court that New York's severe emotional disturbance defense was simply "an expanded version of the common-law defense of heat of passion on sudden provocation . . . ." *Id.*, at 202. The burden of proving this and other affirmative defenses was traditionally on the defendant, both at the common law and when the Fifth and Fourteenth Amendments were passed. *Id.*, at 202. History was thus able to define the limits of the aphorism "that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U. S. 358, 372 (1970) (Harlan, J., concurring). "Proof of the non-existence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case . . . ." 432 U. S., at 210.

Medina reaffirms this tradition of deference to established practices. "[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area." *Medina*, *supra*, 120 L. Ed. 2d, at 363, 112 S. Ct., at 2577. This approach, approved in *Patterson*, "is thus far less intrusive than that approved in *Mathews*," *ibid.*, which involved balancing the individual's against the government's interests in the challenged procedure. See *Mathews*, *supra*, 424 U. S., at 335.

The *Medina* Court's decision to adopt the narrower interpretation of the Due Process Clause hinged upon the incorporation doctrine.

> "The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina*, *supra*, 120 L. Ed. 2d, at 362, 112 S. Ct., at 2576.

The *Medina* Court first limited the scope of the Due Process Clause by looking to the historical basis of the proposed constitutional rule. If a rule is " 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' " *id.*, at 363, 112 S. Ct., at 2577 (quoting *Patterson*, *supra*, 432 U. S., at 202), then it should be part of a long and commonly accepted practice and thus protected under due process. Where the constitutional rule proposed by defendant is not part of a settled tradition, then the challenged state practice is on a much stronger footing. See 120 L. Ed. 2d, at 364, 112 S. Ct., at 2578. A state procedure's worthiness could be further enhanced by looking to current practice. While "of limited relevance to due process inquiry," if the constitutional rule proposed by defendant does not have at least substantial contemporary acceptance there is little reason to believe that the proposed rule is fundamental. *Ibid*.

If the challenge to the state procedure has no basis in history, then the only alternative is an appeal to fundamental fairness. The *Medina* Court recognizes that a historically valid practice may nonetheless be unconstitutional if it "transgresses any recognized principle of 'fundamental fairness' in operation." *Id.*, at 365, 112 S. Ct., at 2578. This Court did not need to explain exactly what constituted a fundamentally unfair procedure because of the weakness of Medina's claim.

Medina claimed that it violated due process for California to place on defendant the burden of proof that

he is incompetent to stand trial. *Id.*, at 359, 112 S. Ct., at 2574. As allocating the burden neither required defendant to disprove any elements of the crime nor rewarded the government for any impropriety, "it [was] not difficult to dispose of petitioner's challenge to the presumption of competence . . . ." *Id.*, at 367, 112 S. Ct., at 2581. Therefore, the *Medina* Court did not have to explore the parameters of fundamental fairness.

Given the deference due to state procedures under the Due Process Clause, a rule guaranteeing fundamental fairness must be narrow. "[F]airness is a relative, not an absolute concept." *Snyder* v. *Massachusetts*, 291 U. S. 97, 116 (1934). Therefore, "what is fair in one set of circumstances may be an act of tyranny in others." *Id.*, at 117. Any standard that is as potentially subjective as fairness must be narrowly construed in order to avoid swallowing up the traditional deference to state criminal procedure.

Mere disagreement with a state procedure is not enough to render it fundamentally unfair. See *Johnson* v. *Louisiana*, 406 U. S. 356, 362 (1972). The definition of fundamental fairness

> "is best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting) (footnotes omitted).

These cases deal with procedures or trials that undermine the basic integrity of the trial. The three cases cited in the *Lundy* dissent—*Moore* v. *Dempsey*, 261 U. S. 86 (1923); *Mooney* v. *Holohan*, 294 U. S. 103 (1935); and *Brown* v. *Mississippi*, 297 U. S. 278 (1936)—represent the worst types of abuses found in the history of American criminal procedure and are mercifully rare.

If a procedure does not violate a specific federal right, is not contrary to a traditional right, and does not critically undermine the trial, then it does not violate due process. The incorporated Bill of Rights and the many protections provided by state law provide state defendants with enough protection that it is unnecessary to turn due process into a code of criminal procedure.

II. Neither instruction abrogates any traditional right, and neither is fundamentally unfair.

A. History.

The strongest argument in favor of the constitutionality of the California and Nebraska instructions is their history. The California instruction, CALJIC 2.90, is taken from one of the landmark cases in American criminal law, *Commonwealth* v. *Webster*, 5 Cush. (59 Mass.) 295, 320 (1850). See 5 B. Witkin and N. Epstein, California Criminal Law § 2652, at 3184 (2d ed. 1989). *Webster* began the application of reasonable doubt "in its modern form in criminal cases." *Apodaca* v. *Oregon*, 406 U. S. 404, 412, n. 6 (1972) (plurality). An attack on CALJIC 2.90 is thus an attack on the foundation of modern reasonable doubt law.

Petitioner Sandoval attempts to distinguish the California instruction from that given in *Webster*. He notes that the instruction read in *Webster* contains additional language on the burden of proof and the need to prove each fact beyond a reasonable doubt. See Petitioner's Brief, at 38-39. This no more than faint praise in light of the assault petitioner makes on the rest of *Webster*. Sandoval asserts that the California "instruction consists of a passage extracted from *Commonwealth* v. *Webster*, each component of which conveys an improper meaning to the jury in current parlance. While the passage—at the time it was penned—conveyed a meaning consistent with the core concept of proof beyond a reasonable doubt, the

meaning presently conveyed is a *gross deviation* from that core concept." *Id.*, at 37 (emphasis added).

This is a dagger thrust at the heart of the *Webster* instruction. No amount of further instruction could save a "gross deviation" from the definition of reasonable doubt. The passage from *Webster* that was adopted by California was, and still is, considered to be the heart of the *Webster* definition of reasonable doubt. See F. Wharton, Wharton's Criminal Evidence § 1, at 2-3 (9th ed. 1884); J. Strong, McCormick on Evidence § 341, at 577 (4th ed. 1992). Sandoval's attack on CALJIC 2.90 is an attack on *Webster*.

The reasonable doubt standard is derived from the presumption of innocence, a principle with roots reaching at least as far back as Roman law, and possibly back to the Old Testament. See *Coffin* v. *United States*, 156 U. S. 432, 453-454 (1895). Reasonable doubt is of much more recent vintage. The earliest use of reasonable doubt is believed to be a 1798 high treason case tried in Dublin. See *Apodaca*, *supra*, 406 U. S., at 412, n. 6. There was a fair amount of confusion over when and how to apply the reasonable doubt standard until the *Webster* decision ushered in the modern age. See *ibid*.

Webster was recognized as the leading definition of reasonable doubt during the period after the ratification of the Fourteenth Amendment. The treatise writers of the day saw *Webster* as the authoritative definition of reasonable doubt. See Wharton's, *supra*, § 1, at 2-3; H. Kelley, Criminal Law and Practice § 374, at 199 (1876). Many states also adopted *Webster*. See, *e.g.*, *Williams* v. *State*, 52 Ala. 411, 413 (1875); *Donnelly* v. *State*, 2 Dutch. (26 N. J.) 601, 615 (1857); *State* v. *Ostrander*, 18 Iowa 435, 459 (1865); *James* v. *State*, 45 Miss. 572, 575 (1871); *Billard* v. *State*, 30 Tex. 368, 373 (1867); *People* v. *Strong*, 30 Cal. 151, 155 (1866).

This Court has also accepted the *Webster* definition of reasonable doubt. In *Miles* v. *United States*, 103 U. S. 304

(1881) the trial court instructed the jury that " '[p]roof beyond a reasonable doubt' is such as will produce an abiding conviction in the mind to a *moral certainty* that the fact exists that is claimed to exist, so that you feel certain that it exists." *Id.*, at 309 (emphasis added). While the *Miles* Court felt that most attempts to define reasonable doubt were futile, see *id.*, at 312, it upheld this "moral certainty" definition. "The language used in this case, however, was certainly *very favorable to the accused*, and is sustained by *respectable authority*. *Commonwealth* v. *Webster*, 5 Cush. (Mass.) 295 . . . ." *Ibid.* (emphasis added); accord *Wilson* v. *United States*, 232 U. S. 563, 570 (1914).

Webster was also endorsed in *Perovich* v. *United States*, 205 U. S. 86 (1907). There, "this instruction [on reasonable doubt] is taken from the charge of Chief Justice Shaw to the jury in *Commonwealth* v. *Webster*, 5 Cush. 295, 320 . . . ." 205 U. S., at 92. This Court upheld the instruction, relying on the prior approval of *Webster* in *Miles*. See *ibid.*

The other early decision that addressed the *Webster* definition was *Hopt* v. *Utah*, 120 U. S. 430 (1887). The instruction at issue did not define reasonable doubt in terms of moral certainty, see *id.*, at 439, but the Court nonetheless noted the *Webster* definition of reasonable doubt, feeling that " 'to a reasonable and moral certainty' add[s] nothing to the words 'beyond a reasonable doubt' . . . ." *Id.*, at 440. The *Hopt* Court felt that in all but the more complicated cases, the best instruction may be to leave reasonable doubt undefined. *Id.*, at 440-441.

Given the approval of *Webster* in *Miles* and the subsequent support of *Miles* in *Perovich* and *Wilson*, this mildly critical dicta is not damning. Furthermore, *Webster* was not being criticized for restricting defendant's rights. The *Hopt* Court instead felt that *Webster* was not up to the task of keeping jurors from arriving at unsupported acquittals.

> "Out of the domain of the exact sciences and actual observation there is no absolute certainty. The guilt of the accused, in the majority of criminal cases, must necessarily be deduced from a variety of circumstances leading to proof of the fact. Persons of speculative minds may in almost every such case suggest possibilities of the truth being different from that established by the most convincing proof. The jurors are not to be led away by speculative notions as to such possibilities." *Id.*, at 439-440.

The Nebraska definition of reasonable doubt uses moral certainty language similar to that found in *Webster* and also defines it as "such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon." *State* v. *Morley*, 474 N. W. 2d 660, 669 (Neb. 1991). While not found in *Webster*, this phrase has a similarly strong background.

This analogy to "important transactions" had its own adherents in 19th century state courts, see, *e.g.*, *Arnold* v. *State*, 23 Ind. 170 (1864); *State* v. *Oscar*, 7 Jones (52 N. C.) 305 (1860), and received strong support from this Court. In *Miles*, *supra*, the trial court, in addition to using moral certainty language from *Webster*, further defined reasonable doubt as the level of belief so " 'that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests.' " 103 U. S., at 309. This language was also approved by the *Miles* Court. See *id.*, at 312.

The *Hopt* Court gave even more explicit approval of this type of instruction. It noted that "an illustration like the one given in this case, by reference to the conviction upon which the jurors would act in the weighty and important concerns of life, would be likely to aid them to a right conclusion . . . ." *Hopt*, *supra*, 120 U. S., at 441.

Using the term "substantial" to help define reasonable doubt, while not as popular as the two definitions discussed above, was not contrary to the roots of reasonable doubt. In *Coffin* v. *United States*, 156 U. S. 432, 453 (1895) the trial court instructed the jury that "[a] reasonable doubt, as that term is employed in the administration of the criminal law, is an honest, *substantial* misgiving, generated by the proof or want of it." (emphasis added). This, and the rest of the reasonable doubt instruction, was held to be a complete instruction on reasonable doubt.[3] *Ibid*. If this term were fundamentally unfair, this Court would have invalidated the instruction in *Coffin*.

"Historical practice is probative of whether a procedural rule can be characterized as fundamental." *Medina* v. *California*, 120 L. Ed. 2d 353, 363, 112 S. Ct. 2572, 2577 (1992); see *Patterson* v. *New York*, 432 U. S. 197, 202 (1977); *In re Winship*, 397 U. S. 358, 361 (1970). The *Medina*, *Patterson*, and *Winship* Courts were using history to see if historical practice justified resorting to due process to impose a particular rule upon the states. "Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.' " *Winship*, *supra*, 397 U. S., at 361-362 (quoting *Duncan* v. *Louisiana*, 391 U. S. 145, 155 (1968)).

Petitioners do not advance such a rule. Instead, the weight of history supports the language found in the California and Nebraska instructions. In *Medina*, the fact that it was unsettled whether history supported defendant's claim was enough to keep this Court from invoking due process to impose a new procedural burden on the state. See *Medina*, *supra*, 120 L. Ed. 2d, at 364, 112 S. Ct., at 2578. Here, where history favors the states' positions, the argument against extending due process is all the stronger.

3. The *Coffin* Court reversed the conviction because there was no additional instruction on the presumption of innocence. See *id*., at 461.

The argument against extending due process is made conclusive by this Court's treatment of the language used in the two instructions. Once this Court approves a practice, other jurisdictions that employ the same or similar practice should be able to rely on this Court's approval. While not infallible, this Court is final, see *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring), and state courts and legislatures have every reason to continue a practice that this Court has approved and has never overturned. Ignoring precedent and dashing these expectations can only diminish respect for the rule of law that is at the heart of *stare decisis*. See *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986); *Planned Parenthood of SE Pa.* v. *Casey*, 120 L. Ed. 2d 674, 700, 112 S. Ct. 2791, 2808 (1992). Ignoring the approval found in *Miles*, *Wilson*, *Perovich*, and *Hopt* will diminish the rule of law.

This Court has usually confined upsetting state expectations in criminal procedure to extending the Bill of Rights to the states. There was usually strong historic precedent for such an extension and frequently a new right was imposed only after many states had adopted similar practices. See, *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643, 651 (1961).

General due process, however, is another matter. Where no specific federal right is asserted, "the Court has always moved with caution before striking down state procedures." *Spencer* v. *Texas*, 385 U. S. 554, 565 (1967). As due process is so open-ended, this Court must be particularly careful not to upset state expectations. Therefore, this Court should not undo what it has already done.

B. Contemporary Practice.

"Contemporary practice, while of limited relevance to the due process inquiry," *Medina* v. *California*, 120 L. Ed. 2d 353, 364, 112 S. Ct. 2572, 2578 (1992), also favors the two instructions. "Moral certainty" is still accepted as a valid term for defining reasonable doubt by other jurisdictions. See, *e.g.*, *Smith* v. *State*, 588 So. 2d 561, 569 (Ala. Crim. App. 1991); *Commonwealth* v. *Beldotti*, 567 N. E. 2d 1219, 1225 (Mass. 1991); *State* v. *Williams*, 828 P. 2d 1006, 1018 (Or. 1992); *State* v. *Rhodes*, 822 P. 2d 960, 978 (Idaho 1991). While there has been minor constitutional criticism of "moral certainty," see *State* v. *Montgomery*, 417 S. E. 2d 742, 750 (N. C. 1992), the primary criticism of *Webster* is not that it *unconstitutionally* deprives defendant of a reasonable doubt instruction, but that it does not help to clarify what reasonable doubt means. See J. Strong, McCormick on Evidence § 341, at 577 (4th ed. 1992).

Even the most eloquent critic of California's reasonable doubt instruction did not assail it in constitutional terms. In *People* v. *Brigham*, 25 Cal. 3d 283, 599 P. 2d 100 (1979) Justice Stanley Mosk, while criticizing CALJIC No. 2.90 and Penal Code section 1096 extensively, concurred in the affirmance of a conviction where this instruction was used. Instead of dissenting on the ground that the reasonable doubt instruction was unconstitutional, he simply called upon the legislature to provide a superior solution to the problem of reasonable doubt. See *id.*, at 314, 599 P. 2d, at 120 (Mosk, J., concurring). Furthermore, this Court's last reference to *Webster* was favorable, noting that it ushered in the modern age of reasonable doubt. See *Apodaca* v. *Oregon*, 406 U. S. 404, 412, n. 6 (1972). "Moral certainty" is not a standard under sustained constitutional assault.

Nor have the states necessarily seen the word "substantial" as poisonous. In *Commonwealth* v. *Stokes*, 615 A. 2d 704, 709-710 (Penn. 1992) the Pennsylvania Supreme Court refused to invalidate a reasonable doubt instruction just because it used the word "substantial" to differentiate reasonable doubt from imagined doubt or passing fancy. See also *Smith* v. *State*, 588 So. 2d 561, 569 (Ala. Crim. App. 1991). In *Holland* v. *United States*, 348 U. S. 121, 140 (1954) this Court affirmed an instruction that stated that a reasonable doubt was a " 'substantial doubt, not a trivial doubt . . . .' " *Holland* v. *United States*, 209 F. 2d 516, 522 (CA 10 1954). While "substantial doubt" must now be used with care, see *Cage* v. *Louisiana*, 498 U. S. 39 (1990),[4] it has not required automatic reversal.

In any event, neither instruction is against the overwhelming weight of authority. Even if the bulk of authority was against them, that would not be enough to make them unconstitutional. See *Martin* v. *Ohio*, 480 U. S. 228, 235-236 (1987). Substantial approval, however, should significantly weigh in favor of the challenged state procedure. Due process only protects rules of fundamental fairness and it is difficult to see how a practice is fundamentally unfair if it has strong historic roots and continues to be observed in several jurisdictions.

C. Fundamental Fairness.

The Due Process Clause's guarantee of fundamental fairness is not an invitation for federal courts to meddle in state criminal procedure. This guarantee only protects the accused from the very worst practices. See Part I B, *ante*, at 6-10. The main source of federal protection is now the Bill of Rights. See *Dowling* v. *United States*, 493 U. S. 342, 352 (1990).

Reasonable doubt is fundamental to the fairness of the criminal trial. See *In re Winship*, 397 U. S. 358, 362-363 (1970). This requirement has roots deep in our constitutional history. See *id.*, at 362. The California and

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4. *Cage* will be addressed in Part III of this brief.

Nebraska instructions are an important part of this history. They have roots that stretch back to the first modern definition of reasonable doubt and have been widely used ever since. See Part II, *ante*, at 10-18. It would be a needless irony to strike down the roots of a requirement steeped in history.

Both instructions tell the jury that they cannot convict if they have a reasonable doubt. Neither definition of reasonable doubt negates this basic requirement. See Part III, *post*, at 18-22. Fundamental fairness can require no more. "In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, [this Court should] find it impossible" to declare these instructions fundamentally unfair. *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967).

III. *Cage* v. *Louisiana* does not render either instruction fundamentally unfair.

This Court's uninterrupted support for the language found in the California and Nebraska reasonable doubt instructions appeared to change in *Cage* v. *Louisiana*, 498 U. S. 39 (1990) *(per curiam)*. *Cage*'s criticism of Louisiana's use of "moral certainty" and "substantial doubt" does not, however, change the mandate of history. These historically sanctioned instructions are not rendered invalid by this brief *per curiam* opinion. Careful analysis of the instruction struck down by *Cage*, this Court's subsequent treatment of that decision, and totality of the California and Nebraska instructions show that neither instruction is diminished by *Cage*.

Any analysis of *Cage* and its impact must begin with the instruction it struck down. The pertinent part read:

> " 'This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*.' " *Id.*, at 40 (emphasis in original).

While three phrases struck the eye of the *Cage* Court, the first was by far the most serious. "Grave" is "1. [r]equiring serious thought; momentous; *a grave decision in a time of crisis*." American Heritage Dictionary 791 (3d ed. 1992) (emphasis in original). This is fundamentally incompatible with any possible definition of reasonable doubt. In effect, the trial court told the jury that it must convict the capital defendant *unless* it had a momentous doubt.

This gross inaccuracy has the effect of shifting the burden of proof to defendant. For the jury to have a "grave" doubt about defendant's guilt, it must feel that defendant's case was stronger than the prosecution's. This role reversal clearly violates due process.

The *Cage* Court did not stop there. It also stated that "substantial," like "grave," "suggest[ed] a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Id.*, at 41. This, combined with the reference to moral certainty, made it "clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Ibid.*

This attack on the grossly inadequate instruction in *Cage* cannot be translated into a broader assault on the California and Nebraska instructions. The *Cage* decision uses a standard for analyzing jury instructions that has since been disapproved. In *Estelle* v. *McGuire*, 116 L. Ed. 2d 385, 399, n. 4, 112 S. Ct. 475, 482, n. 4 (1991)

this Court formally disapproved the "reasonable juror" standard employed in *Cage*, recognizing that *Boyde* v. *California*, 494 U. S. 370, 379-380 (1990) made "reasonable likelihood" the single standard for reviewing jury instructions. While the *Boyde* Court doubted that there was much difference between the various standards used to evaluate instructions, see *id.*, at 379, this opinion still places *Cage* in a different light.

It is no longer enough that a reasonable juror *could* have misapplied the reasonable doubt standard; there must now be a stronger, reasonable likelihood. This change embodies the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde*, *supra*, 494 U. S., at 380.

This places the California and Nebraska instructions in a different light. Although Nebraska refers to "substantial doubt," it does so in a much different context. The Louisiana instruction bluntly asserted that "A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt*." *Cage*, *supra*, 498 U. S., at 40 (emphasis in original). Nebraska, however, takes a much more nuanced approach.

> "A reasonable doubt is an actual and substantial doubt *reasonably arising from the evidence*, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the State, *as distinguished from a doubt arising from mere possibility*, from bare imagination, or from fanciful conjecture." *Morley*, *supra*, 474 N. W. 2d, at 670 (emphasis added).

This is a different use of the term "substantial." The *Cage* instruction was using substantial to mean "[a]mple; sustaining . . . ." American Heritage Dictionary 1791 (3d ed. 1992). Nebraska, however, is using "substantial" to mean "[t]rue or real; not imaginary." *Ibid*. Because there is some doubt inherent in all human affairs, there is a risk that juries will use this inherent doubt as the foundation for unwarranted acquittals. See *Hopt* v. *Utah*,

120 U. S. 430, 439-440 (1887). By defining "substantial" as not "mere possibility, . . . bare imagination, or . . . fanciful conjecture" the Nebraska instruction advances the important goal of minimizing the risk of jury error.

The validity of Nebraska's instruction is further enhanced by the inclusion of the "graver and more important transactions of life" language. This type of instruction has been consistently approved as one of the best ways of defining reasonable doubt. See, *e.g.*, *id.*, at 441; *Holland* v. *United States*, 348 U. S. 121, 140 (1954). Taken as a whole, Nebraska more than adequately instructs its juries on reasonable doubt.

The use of "moral certainty" does not render either the California or the Nebraska instruction unconstitutional. This old and well-respected term was criticized in *Cage* because it was combined with the grossly improper uses of "grave" and "substantial." As California uses neither of these terms and Nebraska's use of "substantial" is proper within its context, "moral certainty" does not poison either instruction. It is a term "that has received frequent sanction and has been quoted innumerable times . . . ." 9 J. Wigmore, Evidence § 2497, at 405 (Chadbourn rev. 1981). The brief, partially overruled *Cage per curiam* should not be allowed to strike down this long-accepted instruction.

"Moral certainty" may not be this Court's ideal of a proper reasonable doubt instruction, but this Court does not review the wisdom of a state's practice. See *Johnson* v. *Louisiana*, 406 U. S. 356, 362 (1972). It is looking for that rarest of practices, a fundamentally unfair procedure. Unlike "grave doubt," moral certainty does not tell the jury to use a standard different from reasonable doubt. Instead, the *Webster* instruction used by California refers to simple "reasonable doubt" and requires the jury to have "an abiding conviction" of defendant's guilt. See Opp., at 5, n. 2.

Furthermore, the California instruction places moral certainty in a different context than the instruction in *Cage*. The California instruction states "[i]t is that state of the case which after the *entire comparison and consideration of all the evidence* leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." *Ibid*. (emphasis added). The *Cage* Court was concerned that the instruction before it would keep the jury from basing its verdict on "evidentiary certainty." *Cage*, *supra*, 498 U. S., at 41. California's instruction, however, explicitly requires the jury to consider all the evidence before reaching its verdict.

The key to the *Cage* opinion is the "grave uncertainty" language. As Justice Stevens has noted, an instruction that does not contain the "grave uncertainty" language condemned by *Cage* does not raise the question of whether *Cage* was violated. See *Gaskins* v. *McKellar*, 114 L. Ed. 2d 728, 111 S. Ct. 2277 (1991) (Stevens, J., concurring in denial of certiorari). As neither of these instructions have that fatal flaw, *Cage* should not be invoked to void the long-respected practices embodied in the California and Nebraska instructions.

IV. This Court should not stifle experimentation in this difficult area.

A. Limited Alternatives.

Before this Court considers voiding the California and Nebraska instructions it should consider the problem of coming up with a constitutionally acceptable alternative. Several states use language that is the same or similar to that found in these two instructions, and many states rely on pattern instructions in order to insure an important consistency in the treatment of defendants. This means that disapproval of the instructions in question could leave

many convictions vulnerable, as a key instruction used in every prosecution is suddenly uprooted.

If this Court does not provide the states with guidance on what is an acceptable instruction, confusion is sure to follow. One need only look at the aftermath of *Furman* v. *Georgia*, 408 U. S. 238 (1972), where many states responded to the many *Furman* opinions by eliminating the sentencer's discretion in capital cases, only to have this approach rejected in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). The reasonable doubt instruction must be given in every criminal case. As failure to give a proper reasonable doubt instruction is never harmless error, see *Sullivan* v. *Louisiana*, 124 L. Ed. 2d 182, 190, 113 S. Ct. 2078, 2082 (1993), this matter is too important to be left undecided.

The problem, however, is that there is no clearly superior definition of reasonable doubt. The problem of defining reasonable doubt has been well-documented and widely lamented. See, *e.g.*, *Miles* v. *United States*, 103 U. S. 304, 312 (1881); *Dunbar* v. *United States*, 156 U. S. 185, 199 (1895); 9 J. Wigmore, Evidence § 2497, at 405 (Chadbourn rev. 1981). This Court should not use the Due Process Clause to try to solve this mystery.

The problem with defining reasonable doubt is that "[o]ut of the domain of the exact sciences and actual observation there is no absolute certainty." *Hopt* v. *Utah*, 120 U. S. 430, 439 (1887). Since trials are far from scientific, the reasonable doubt instruction must prevent the trivial doubt inevitable in human affairs from requiring an acquittal in every case, while at the same time preserving the presumption of innocence.

Perhaps the most popular alternative to the *Webster* definition is one of the many variants of the "important transactions" instruction found in Nebraska. See *State* v. *Morley*, 474 N. W. 2d 660, 669 (1991). This illustration is popular in the federal courts and has been well-received by this Court. See *Hopt*, *supra*, 120 U. S., at 441; *Miles*,

supra, 103 U. S., at 312; *Holland* v. *United States*, 348 U. S. 121, 140 (1954); *United States* v. *Ivic*, 700 F. 2d 51, 68 (CA2 1983).

There is nothing wrong with this type of instruction and any instruction that used this language would help the jury understand its duty. Yet it is not necessarily the best definition. Because it illustrates by way of analogy, it requires jurors to make an extra logical connection that they would not have to make if reasonable doubt were defined directly. While it may be better than any current definition, it is by no means the best possible one. There may be some undiscovered instruction that will even better illustrate the jury's duty to weigh the evidence.

The other popular posture is to leave reasonable doubt undefined. See, *e.g.*, *People* v. *Brigham*, 25 Cal. 3d 283, 314, 599 P. 2d 100, 120 (1979) (Mosk, J., concurring). This approach would upset the many instructions that try to define reasonable doubt. Furthermore, in complicated cases some definition of reasonable doubt may be necessary to guide the jury. See *Hopt* v. *Utah*, 120 U. S. 430, 440 (1887). Adopting a no-definition rule leaves juries in the dark and precludes trial courts from finding better alternatives.

It is unfair to expect perfection, even from this Court. After all, this Court is final, not infallible. See *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring). But when this Court invokes the Constitution to require a state to follow a particular standard, it should impose only the best possible standard.

If this Court says that as a matter of constitutional law the states must define reasonable doubt in a particular way, then the debate and experimentation over the proper reasonable doubt instruction will ossify, and this Court's standard will become the unanimous rule. This will stifle all innovation until this Court decides to return to the issue. Given the great pressures on this Court's resources, it is unlikely that it will soon return to the issue of

defining reasonable doubt. For example, for nearly seventy years the leading case on the key issue of admitting scientific testimony did not come from this Court, but from a federal circuit court, *Frye* v. *United States*, 293 F. 1013 (D. C. App. 1923). Only many years after changes in Rule 702 of the Federal Rules of Evidence did this Court weigh in with its own standard. See *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). Thus, any standard announced in this case is likely to be the sole standard for a very long time.

Even if this Court allows the states to vary from whatever definition of reasonable doubt it announces, innovation is likely to stop. *Miranda* v. *Arizona*, 384 U. S. 436 (1966) shows how the inherent coercive power behind this Court's pronouncement can turn even the most voluntary standards into rigid rules.

When the *Miranda* Court announced the now famous warnings, it did not intend to end the dialogue on what warning would be proper. "The warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant." *Id.*, at 476 (emphasis added). Yet there has been no flowering of ideas on alternative warnings after *Miranda*.

While some agencies like the FBI do vary their warnings from *Miranda*, see *Duckworth* v. *Eagan*, 492 U. S. 195, 202, n. 4 (1989), for the most part, *Miranda* is the standard. This happens because any state that varies from the *Miranda* standard risks substantial litigation and the prospect of having many convictions reversed for *Miranda* violations. In *Eagan*, the *Miranda* warnings given by the police varied from the original by noting that "*We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.*" *Id.*,

at 198 (emphasis in original). The *Eagan* Court vindicated this minor variance, but it did so on a narrow five-to-four majority, and had to overturn a decision by the Seventh Circuit granting habeas corpus. See *id.*, at 200-201. If such a small deviation from the norm requires that much effort to defend, there is no question why *Miranda* has stopped most innovation.

Reasonable doubt is even more important than the *Miranda* warnings. A reasonable doubt instruction must be given in every criminal trial, see *In re Winship*, 397 U. S. 358, 364 (1970), and failure to give an adequate instruction is never harmless error. See *Sullivan* v. *Louisiana*, 124 L. Ed. 2d 182, 190, 113 S. Ct. 2078, 2082 (1993). Thus, any standard announced in the present case would have to be followed even more closely than the one in *Miranda*.

That would be a real tragedy. The states are the laboratories of the law. They must be given the freedom to experiment so that we can all profit by picking from the best of the diverse approaches adopted by the fifty states. "The science of government . . . . is the science of experiment." *Anderson* v. *Dunn*, 6 Wheat. (19 U. S.) 204, 226 (1821), overruled on other grounds in *Kilbourn* v. *Thompson*, 103 U. S. 168, 199-200 (1881).

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable

> to matters of substantive laws as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting) (footnote omitted); accord *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 546 (1985).

B. The Slippery Slope.

Petitioners' desire to invoke the Due Process Clause to interfere with these two traditionally accepted instructions places this Court at the precipice of a particularly slippery slope. If this Court heeds their wishes, it will come much closer to creating a constitutional code of evidence. That result is a calamity that must be resisted.

There are times when this Court should strike down a reasonable doubt instruction. When one is as egregiously bad as the instruction in *Cage* v. *Louisiana*, 498 U. S. 39 (1990), then reversal is deserved. But the instructions in the present case are of a different type. Whatever their minor imperfections, they do not contain the gross inaccuracies found in the instruction condemned in *Cage*. See Part III, *ante*, at 18-22. A decision condemning the California and Nebraska decisions thus comes much closer to an intrusion into the law of evidence.

This Court's experience with other constitutional evidence issues should keep it from expanding this field. One of the best examples of the problems associated with constitutionalizing evidentiary issues is the current tangled state of death penalty law. What started with a generalized disapproval of the unfettered jury discretion in *Furman* v. *Georgia*, 408 U. S. 238 (1972) has evolved into one of the most complicated areas of American law. Responding to the various circumstances of capital

litigation, this Court now simultaneously requires the states to limit the sentencer's discretion, see *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (plurality), while at the same time giving the sentencer the discretion and information necessary to make an individualized determination of the appropriate sentence for each capital defendant. See *Woodson* v. *North Carolina*, 428 U. S. 280, 303-305 (1976) (plurality); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality). At the very least there is "inherent tension between" these two lines, see *McCleskey* v. *Kemp*, 481 U. S. 279, 363 (1987) (Blackmun, J., dissenting), while others would be even less charitably disposed towards the dissonance. See *Walton* v. *Arizona*, 497 U. S. 639, 664 (1990) (Scalia, J., concurring). In any event, they are a fertile source of complexity and unending litigation.

The Eighth Amendment is now drenched in evidentiary issues such as requiring the admission of certain types of evidence, see, *e.g.*, *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), and the instructions given juries, see, *e.g.*, *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985); *Mills* v. *Maryland*, 486 U. S. 367 (1988). While these inquiries may be necessary, there is no doubt that they are very complicated and take up enormous judicial resources.

This Court's experience with *Miranda* v. *Arizona*, 384 U. S. 436 (1966) is similar. *Miranda* should have limited the complexity of the law of confessions. It forbids courts from using the facts of a particular case beyond determining whether the *Miranda* guidelines were followed. *Id.*, at 468-469. Instead, the *Miranda* Court supplied a set of guidelines for the courts and police to follow. *Id.*, at 441-442.

This did not eliminate litigation. *Miranda* has been a steady source of cases for this Court over the years, and the supply has not yet abated. See, *e.g.*, *Edwards* v. *Arizona*, 451 U. S. 477 (1981); *Arizona* v. *Roberson*, 486 U. S. 675 (1988); *Minnick* v. *Mississippi*, 112 L. Ed. 2d 489, 111 S. Ct. 486 (1990); *Stansbury* v. *California*, No. 93-5770 (cert. granted Nov. 1, 1993). Considerable problems have arisen over such issues as the difference between interrogation and spontaneous declaration, adequacy of the waiver, and the adequacy of the warning. See *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 432, 113 S. Ct. 1745, 1763 (1993) (O'Connor, J., dissenting).

Miranda involves just one part of the law of evidence, the privilege against self-incrimination. While the decision itself may be worthwhile, it has come at a high cost of complexity and continued litigation.

The law of evidence is inherently complex. Because it is very fact-intensive and involves an extraordinarily large set of legal principles, evidentiary issues always carry with them the threat of complexity. Thus, while it took Professor LaFave only four volumes to complete his masterwork on search and seizure, see LaFave, Search and Seizure (2d ed. 1987), it took Dean Wigmore nine larger volumes to explain the law of evidence. See Wigmore, Evidence (3d ed. 1940). While not precise, this is a good measure of how dangerous constitutionalizing the law of evidence can be.

Therefore, it comes as no surprise that this Court has taken great pains to avoid using the confrontation clause to constitutionalize the rule against hearsay. See *Dutton* v. *Evans*, 400 U. S. 74, 80 (1970). Instead it has sought to protect the narrower principles of confrontation by focusing on protecting defendant's right to "full and effective cross-examination." *California* v. *Green*, 399 U. S. 149, 158 (1970). This is much less complex and disruptive than "a reappraisal of every exception to the hearsay rule, no matter how long established . . . ." *Dutton*, *supra*, 400 U. S., at 80.

Such deference is even more important in the present case. The death penalty, *Miranda*, and the confrontation clause involved specific protections grounded in the Bill of Rights. The present case involves the much more subjective claim of general unfairness. This Court has

been unwilling to aggressively extend this ephemeral portion of the Due Process Clause and should continue to do so here. See *Spencer* v. *Texas*, 385 U. S. 554, 565 (1967).

CONCLUSION

The decisions of the California Supreme Court and the Nebraska Supreme Court should be affirmed.

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Respectfully submitted,

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APPENDIX

California Jury Instructions—Criminal ("CALJIC") No. 2.90 (5th ed. 1988):

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

State v. *Morley*, 474 N. W. 2d 660, 669-670 (Neb. 1991):

> " 'Reasonable doubt' is such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be mistaken. The jury may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt

> that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture."